


ORDERED.

Dated: February 03, 2021

  
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Lori V. Vaughan  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re:	)	Case No. 6:19-bk-07256-LVV
	)	Chapter 7
Jane McGrory,	)	
	)	
Debtor.	)	
_____	)	
David Roberts and Shantie Roberts,	)	
	)	Adv. No. 6:20-ap-00027-LVV
Plaintiffs,	)	
	)	
v.	)	
	)	
Jane McGrory,	)	
	)	
Defendant.	)	
_____	)	

**ORDER GRANTING**  
**MOTION TO DISMISS ADVERSARY PROCEEDING**

Plaintiffs, David and Shantie Roberts (the “Plaintiffs”), filed adversary proceedings against debtors Jane McGrory (“McGrory”) (Adv. Proc. 20-ap-27, the “McGrory Adversary”) and her husband, Tony Hopkins (“Hopkins” and with McGrory, the “Debtors”) (Adv. Proc. 20-ap-32, the “Hopkins Adversary”) in their respective bankruptcy cases, asserting in each proceeding an identical one-count amended complaint (the “Complaints,” McGrory Adversary, Doc. No. 3 & Hopkins

Adversary, Doc. No. 4). Plaintiffs seek to impose an equitable lien on the Debtors' homestead at 2061 Bridgeport Circle Rockledge, FL 32955 (the "Homestead") because of alleged fraudulent transfers used to make mortgage payments on the Homestead. Debtors seek to dismiss the Complaints (McGrory Adversary, Doc No. 12 & Hopkins Adversary, Doc. No. 13).<sup>1</sup> Plaintiffs oppose dismissal and both parties have submitted supplemental briefs on the issues. Because the Complaints seek identical relief and are based on the same facts and law, the Court will address both in this opinion.<sup>2</sup> For the reasons discussed below the Court dismisses both adversary proceedings with prejudice.

### **Factual Background**

The Complaints allege these facts.<sup>3</sup> In 2011, Hopkins agreed to purchase a business—Sunbay Fitness Gym—from the Plaintiffs. (Compl. Exh. C at ¶¶12-17). As a result of the agreement, Hopkins issued two promissory notes (the "Notes") in the amounts of \$436,857.84 and \$198,000 secured by his stock in his business Perissos, Inc. ("Perissos") (Compl. Exh. C at ¶¶14-16). Hopkins was the sole shareholder of Perissos. (Compl. Exh. C at ¶32).

On January 7, 2013, Hopkins and McGrory were married and that same day Hopkins conveyed all Perissos stock to himself and McGrory as tenants by the entireties. (Compl. Exh. C at ¶¶33-34). Hopkins shortly thereafter defaulted on the Notes (Compl. Exh. C at ¶ 30). Plaintiffs declared a default and sued Hopkins in Florida state court (the "Note Case").<sup>4</sup> (Compl. at ¶8). McGrory was later added as a defendant in the Note Case. In 2015, Perissos made a series of cash payments to Pistevo, alimony payments to Hopkin's ex-wife Sally Hopkins, credit card payments for McGrory and Hopkins, and payments on a Bank of America loan. (See Compl. at ¶3, (Exh. A).

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<sup>1</sup> The Motions to Dismiss were heard on July 8, 2020, September 1, 2020, and November 3, 2020.

<sup>2</sup> An identical order is being entered in adversary proceeding 6:20-ap-32-LVV.

<sup>3</sup> Except for some minor details, the Complaints are identical. References to the "Compl." refers to both Complaints. For purposes of the Motions to Dismiss, the Court assumes that the facts alleged in the Complaints are true.

<sup>4</sup> Case No. 05-2013-CA-029677 pending before the Circuit Court of the Eighteenth Judicial Circuit of Florida.

Perissos then was dissolved and its remaining assets transferred for no consideration to Pistevo and another company owned by McGrory and Hopkins named Oraya to Go, Inc. (“Oraya”). (Compl. at ¶15). Based on these transfers, Plaintiffs asserted claims<sup>5</sup> against Hopkins and McGrory in the Note Action, including a claim to impose an equitable lien on their property. (See Compl. Exh. C). In April of 2019, Pistevo went out of business.

Before entry of a judgment in the Note Action, McGrory filed for bankruptcy under Chapter 7 on November 4, 2019, and Hopkins filed for bankruptcy under Chapter 13 on November 5, 2019. (Compl. at ¶17). On January 3, 2020, the Plaintiffs filed their Objection to Claim of Exemption against Hopkins<sup>6</sup> (Hopkins’ Main Case Doc. No. 15) and filed an identical Amended Objection against McGrory on January 13, 2020 (Main Case Doc. No. 13). Soon after, Plaintiffs filed the Complaints.

### **Standard for Motion to Dismiss**

Rule 12(b)(6) provides that before an answer is filed, a defendant may seek dismissal of a complaint if the complaint fails to state a claim. Fed. R. Civ. P. 12(b)(6).<sup>7</sup> Disposition of a motion to dismiss under Rule 12(b)(6) focuses only upon the allegations in the complaint and whether those allegations state a claim for relief. In reviewing a motion to dismiss, courts must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Brophy v. Jiangbo Pharm., Inc.*, 781 F.3d 1296, 1301 (11th Cir. 2015) (quoting *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, 769 F.3d 1291, 1293 (11th Cir. 2014) (quoting *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003))). Under Rule 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>8</sup> Rule 8(a)(3) requires a “demand

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<sup>5</sup> The Fifth Amended Complaint filed in the Note Action asserts claims against Hopkins and McGrory which include Foreclosure of Security Interest, Fraudulent Conveyance, Pierce Corporate Veil, Reformation, Equitable Lien and Constructive Trust.

<sup>6</sup> Case No. 06:19-bk-07280-LVV

<sup>7</sup> Rule 12(b) is made applicable in adversary proceedings by virtue of Bankruptcy Rule 7012.

<sup>8</sup> Rule (8)(a) is made applicable in adversary proceedings by virtue of Bankruptcy Rule 7008(a).

for the relief sought.” Fed. R. Civ. P. 8(a)(3). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

For a complaint to survive a motion to dismiss, it must contain enough factual matter to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citing *Twombly*, 550 U.S. at 570) (internal quotation marks omitted). Facial plausibility is present “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Courts routinely allow amendments to complaints dismissed for failure to state a claim, particularly for pro se parties; however, when amendment is futile, dismissal with prejudice is merited. *Dragash v. Fed. Nat’l Mortg. Ass’n*, 700 F. App’x 939, 946 (11th Cir. 2017) (“Nor do we find error in the denial of leave to amend based on futility. While leave to amend ordinarily should be freely given, a district court need not grant even a pro se plaintiff leave to amend where amendment would be futile.”); *LaCroix v. W. Dist. of Kentucky*, 627 F. App’x 816, 819 (11th Cir. 2015), cert. dismissed sub nom. *LaCroix v. U.S. Dist. Court for W. Dist. of Kentucky*, 136 S. Ct. 996, 996 (2016) (court “need not allow amendment where a more carefully drafted complaint could not state a claim and is, therefore, futile”). Accepting all of the facts alleged in the Complaint as true, for the reasons stated below, the Court finds that Plaintiffs have failed to state a claim and, therefore, the Complaints must be dismissed.

### **The Florida Homestead Exemption**

In the one-count Complaint, Plaintiffs, seek only to impose an equitable lien on the Debtors’ homestead. In Florida, a debtor’s homestead is exempt from execution by a creditor except in the case

of three enumerated exceptions, i.e. “the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty...” Fla. Const. art. X, § 4. A broad and liberal application of the homestead exemption is well-established in Florida law as a means for the protection of the family home. And yet, Florida courts have cautioned this application should not allow the homestead exemption to be an instrument of fraud. *See Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018, 1028 (Fla. 2001).

In *Havoco*, the Florida Supreme Court held that this constitutional exemption protected the homestead even when the homeowner transferred non-exempt assets into the homestead with the intent to hinder, delay or defraud creditors. *Id.* The court noted, however, not all funds transferred into the homestead with fraudulent intent are protected. The court stated:

The transfer of non-exempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors is not one of the three exceptions to the homestead exemption provided in article X, section 4. Nor can we reasonably extend our equitable lien jurisprudence to except such conduct from the exemption’s protection. We have invoked equitable principles to reach beyond the literal language of the exceptions only where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead.

*Id.* Consistent with *Havoco*, the Eleventh Circuit Court of Appeals has held that funds obtained by fraudulent transfer are sufficient “fraud or egregious conduct” to support an equitable lien when the fraudulently transferred funds are used to invest in, purchase or improve a homestead. *LaMarca v. Jansen (In re Bifani)*, 580 F. App’x. 740, 747 (11th Cir. 2014).

Here, Plaintiffs are creditors of Hopkins by reason of two promissory notes issued before 2013.<sup>9</sup> Plaintiffs allege that while trying to foreclose their security interest in the Perissos stock,

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<sup>9</sup> Hopkins’ personal liability on the Notes was discharged by his prior chapter 7 bankruptcy, but the pledge of his interest in Perissos was unaffected. Neither party addresses the impact of Hopkins prior bankruptcy on this proceeding and, accordingly, the Court has not addressed this issue.

Perissos transferred funds to entities owned by the Debtors and paid personal expenses of the Debtors, including several mortgage payments to Bank of America. Plaintiffs argue that these fraudulent transfers entitle them to an equitable lien on the Homestead. Assuming all the alleged facts are true, Plaintiffs cannot establish entitlement to an equitable lien under *Havoco* or its progeny.

### **The Alleged Facts Do Not Support an Equitable Lien**

Imposition of an equitable lien is a remedy designed to prevent unjust enrichment. *See Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein*, 619 So. 2d 267, 270 (Fla. 1993) (when imposing equitable liens, courts should focus on whether the party claiming the homestead exemption would be unjustly enriched). Unjust enrichment is the key distinction in *Havoco*. An equitable lien on a homestead is permitted only when funds used to invest in, purchase, or improve the home were *obtained* through fraud or egregious conduct. Contrast this with the situation in *Havoco* where the homeowner obtained the funds through no improper conduct – the funds rightfully belonged to the debtor – but the alleged fraud was the conduct of investing the funds into the homestead to protect the funds from creditors. Under the *Havoco* facts, there was no unjust enrichment because the homeowner rightfully possessed the funds from the start and the court held that creditors were not entitled to an equitable lien. “The key is how the monies were obtained, not how they were used.” *In re Cameron*, 359 B.R. 818, 822 (Bankr. M.D. Fla. 2006). Hence, to impose an equitable lien, the creditor must establish both the fraud or egregious conduct (in this case the fraudulent transfer) and then trace those funds into an investment in, purchase, or improvement of the homestead.

Here, Plaintiffs skip the first two steps and jump straight to the third. Plaintiffs assert no claim for fraudulent transfer.<sup>10</sup> Plaintiffs bring no cause of action to establish Debtors’ liability for the

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<sup>10</sup> It is not enough that Plaintiffs have or had a cause of action for fraudulent transfer against the Debtors in the Note Case. That action has been stayed and has not resulted in a judgment establishing a claim against the Debtor. Plaintiffs must still establish entitlement.

amounts at issue, much less to establish a debt that would fall under the equitable exception described in *Havoco*. Instead, Plaintiffs simply allege there were fraudulent transfers and then state that an equitable lien should be imposed “based on the promissory notes and in consideration of right and justice.”<sup>11</sup> Plaintiffs’ Complaints appear to be an attempt to make the Debtors responsible for the amounts due under the Notes without asserting a cause of action or valid legal theory.

Plaintiffs further fail to assert how the transferred funds end up in the Homestead. “In addition to proving the funds used to acquire the homestead were obtained fraudulently, the party seeking to impose the equitable lien must ‘trace the proceeds derived from the fraudulent or egregious conduct directly to the purchase, pay off, or improvement of the homestead.’” *In re Crum*, 294 B.R. 402, 405 (Bankr. M.D. Fla. 2003) (*citing Havoco*, 790 So. 2d at 1028).

In their Complaints, the Plaintiffs assert that they are entitled to an equitable lien on the Homestead by virtue of the transfer of assets out of Perissos. Plaintiffs assert Debtors fraudulently transferred funds from Perissos directly to the Debtors, and indirectly through Pestivo and Oraya (entities owned by the Debtors) in the form of payment of the Debtors’ personal expenses. Plaintiffs then simply state that the Debtor is not entitled to a homestead exemption because they used money from Perissos and Pestivo to pay their mortgage. Plaintiffs, however, do not attempt to establish how the funds transferred to Pestivo can then be traced to the Debtors’ homestead. It is not enough that Pestivo transferred funds that ended up in the Homestead. The funds must be the fraudulently transferred funds from Perissos. Instead, Plaintiffs appear to seek an equitable lien for all amounts

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<sup>11</sup> To be clear, the Court is not convinced the Plaintiffs even have a cause of action against Debtors. In their Fifth Amended Complaint filed in the Note Action (which bears no resemblance to the complaint or causes of action before this Court), Plaintiffs do not contend that they are creditors of Perissos. Plaintiffs hold a security interest in the stock of Perissos and seek to foreclose it. In the same complaint, Plaintiffs assert claims against Debtors for fraudulent transfer and unjust enrichment for amounts transferred from Perissos to Debtors (or from Perissos to other entities controlled by the Debtors), but never establish how they have superior rights to such funds either as a creditor of Perissos or owner. Perhaps the entity Perissos has claims against the Debtor arising from the conduct described, but the Court fails to see how that conduct gives rise to a claim in favor of Plaintiffs as holders of a lien on the corporate stock.

transferred without even alleging that the funds ended up in the Homestead. In fact, the allegations make it clear most of the monies transferred have nothing to do with the Homestead. A simple allegation of a fraudulent transfer or even fraud is not enough to support imposing an equitable lien on the Debtors' Homestead. The lack of tracing such amounts to the Homestead is fatal to Plaintiff's cause of action.

**Debtors' Mortgage Payments Do Not Create an Exception to the Homestead Exemption**

Even had Plaintiffs properly asserted a claim against Debtors for fraudulent transfer and traced the fraudulently transferred funds to the Debtors, the facts do not support the imposition of an equitable lien on the Homestead. Plaintiffs allege only that the Debtors may not exempt the Homestead from their claims because Debtors "used money paid directly out of Perissos and Pistevo to pay the mortgage of their home." (Compl. at ¶19). Plaintiffs attach to the Complaints as Exhibit B copies of several checks supporting this allegation. Among the checks that make up Exhibit B are three checks to Bank of America each for \$1,297.70. One of the attached checks is paid from Perissos, and two are from Pestivo. These three checks are the only indication that monies from Perissos or Pestivo went towards the Debtors' Homestead. The three checks show monthly mortgage payments on the Debtors' Homestead. The checks are each made for the same amount and are made in successive months as detailed in the monthly bank statements also attached as Exhibit B.

An equitable lien on homestead property is only available "where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead." *Havoco*, 790 So. 2d at 1028. In *Havoco*, the court explained that it has only recognized exceptions to the homestead exemption in rare circumstances to prevent the homestead becoming an instrument of fraud "where the equities have demanded it" and "with due regard to the exceptions provided article x, section 4" of the Florida Constitution." *Id.* at 1023-24. This "due regard" language appears to refer to the resemblance of the requirements for imposition of an equitable exception to the constitutional

exceptions. The Florida Constitution includes exceptions for “obligations contracted for the purchase, improvement or repair thereof,” whereas in *Havoco*, the court recognized a judicially developed set of equitable exceptions when there is no contract, but funds obtained through fraud or egregious conduct are used to “invest in, purchase, or improve the homestead.” The question then is whether three monthly mortgage payments are the equivalent of monies used to invest in, purchase or improve the homestead. This Court holds they are not.

The concepts of purchase or improvement of the homestead are relatively straight forward. To improve generally means to develop, or to increase the value or enhance the appearance of something. *Black’s Law Dictionary* 907 (11th ed. 2019). Improvement with respect to real property generally refers to an addition to the property. *Id.* The *Havoco* court cited two decisions where equitable liens were imposed when wrongfully-obtained funds were used to build or upgrade property. See *LaMar v. Lechliden*, 185 So. 833 (Fla. 1939) (equitable lien allowed where plaintiffs constructed an addition to the home on defendant’s homestead property while understanding they would acquire an interest therein); *Jones v. Carpenter*, 106 So. 127 (Fla. 1925) (imposing equitable lien after the former president of a bread company used embezzled corporate funds to paint and install a new roof on his homestead). The payment of regular mortgage payments does not improve the property.

Purchase means to buy or to acquire. *Black’s Law Dictionary* 1491 (11th ed. 2019). One might assume that a mortgage is associated with the purchase of property, but that is not always true. Mortgages can be used to refinance existing debt or to monetize equity in a home. Here, there is no allegation or exhibit suggesting that the mortgage loan was used to purchase the Homestead, but even if there were, three regular mortgage payments hardly equate to an acquisition of property. Further, this equitable exception was developed in cases where the funds were used to acquire the home or to

satisfy an existing mortgage. See *Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein*, 619 So. 2d 267 (Fla. 1993) (imposing an equitable lien after the debtor used fraudulently obtained loan proceeds to satisfy three existing mortgages and property taxes); *Craven v. Hartley*, 135 So. 899 (Fla. 1931) (imposing equitable lien for monies loan to purchase home after debtor refused to execute promised mortgage). Here, there is no satisfaction of the mortgage. Further, the small principal reduction, which is not alleged in the Complaints or its exhibits, is not sufficient to create anything more than nominal value.<sup>12</sup> The mortgage payments do not qualify as a purchase of the homestead under *Havoco*.<sup>13</sup>

Of the three exceptions, an “investment in” the homestead may be the hardest to define. Black’s Law Dictionary defines “invest” as to “apply (money) for profit” or to “make an outlay of money for profit.” *Black’s Law Dictionary* 989 (11th ed. 2019). It further defines an investment as “an expenditure to acquire property or assets to produce revenue; a capital outlay.” *Id.* Unlike the other two equitable exceptions, the term investment does not appear in the Florida Constitution, which refers instead to repair of the homestead. There also appears to be little if any discussion of this exception in the case law. In *Havoco*, the court cites to its prior decision in *Sonneman v. Tuszynski*, 191 So. 18 (Fla. 1939) in describing their decision to impose an equitable lien based on “the strength of the money and sweat equity she invested in the property.” *Havoco*, 790 So.2d at 1026. In *Sonneman*, the plaintiff was an elderly woman who provided domestic services to the defendant and advanced funds used to assist in purchasing and operating a tourist camp with the understanding that the defendant would take care of her for the rest of her life. 191 So. at 19. After the defendant reneged

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<sup>12</sup> The three mortgage payments total only \$3,891.

<sup>13</sup> To support their argument to impose an equitable lien, Plaintiffs direct the Court's attention to the case *Flinn v. Doty*, 214 So. 3d 683 (Fla. 4th DCA 2017), but misinterpret the conclusion reached by that court. Although the court in *Flinn* did conclude that an equitable lien is proper to prevent unjust enrichment, it came to this conclusion because the appellant had used the proceeds of the sale of her parents’ property to pay off her pre-existing mortgage on her home. *Id.* at 685. Currently, there is nothing to indicate in the present case that the mortgage payment was used to pay off the mortgage held by Bank of America or that the payments would fall under any other exception.

on the promise to support the plaintiff, the court granted an equitable lien in favor of the plaintiff describing the work and monies put into the property. *Id.* at 20.

This Court interprets the term “investment in” as used by *Havoco* to mean monies or actions that create value in property just like the work and advances made by the plaintiff in *Sonneman* created value in the camp. How do the terms investment and improvement differ? Both terms refer to value added to the homestead property. Improvements are additions to or upgrades to the existing property which add value. Investment on the other hand may include monies spent on the upkeep and repairs or operations of the property. While these may not improve the property by adding to or upgrading the property, they add value by maintaining the function or appearance. Three monthly mortgage payments in this case do not equate to improvement of the Homestead. They did not repair or maintain the property, nor did they provide funding to operate the property as in *Sonneman*.

### **Conclusion**

An equitable lien may only be placed on a homestead when funds obtained through fraud or egregious behavior are used to purchase, invest in, or improve the homestead. Even had Plaintiffs brought a claim for fraudulent transfer and traced the funds into the mortgage payments on the Homestead, Plaintiffs still cannot state a claim for an equitable lien because three regular mortgage payments do not satisfy the requirement of monies used to invest in, purchase, or improve the homestead. This does not mean the use of fraudulently obtained funds to pay a mortgage can never result in an equitable lien. A substantial principal reduction of the mortgage loan or payment of several mortgage payments may qualify as a purchase or investment in the homestead. That is not the case here.

Accordingly, it is

**ORDERED:**

1. Defendant's Motion to Dismiss (Doc. No. 12) is **GRANTED**.
2. This adversary proceeding is **DISMISSED WITH PREJUDICE**.
3. The Clerk is directed to close this case.

Attorney L. Todd Budgen is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.